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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN LANZELL ROACH,

Defendant and Appellant.

D075132

(Super. Ct. No. FVI024908-2)

APPEAL from a judgment of the Superior Court of San Bernardino County, John M. Tomberlin, Judge. Affirmed and remanded with instructions.

Randall Bookout, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Kevin Lanzell Roach of the first degree murder of Dustin D. (Pen. Code, § 187, subd. (a);¹ count 3), and the attempted second degree robbery (§§ 211 and 664; count 2) and the first degree murder of Peter R. (§ 187, subd. (a); count 1). The jury found true the special circumstance allegation that Roach killed Peter while engaged in the attempted commission of a robbery (§ 190.2, subd. (a)(17)(A)). The jury also found true the special circumstance allegations that Roach had been convicted in this proceeding of more than one first or second degree murder offense (§ 190.2, subd. (a)(3)). For all three offenses, the jury found true firearm use allegations that Roach personally and intentionally discharged a firearm proximately causing great bodily injury and death to Peter and Dustin within the meaning of section 12022.53, subdivision (d).

On count 1 (Peter's murder), the court sentenced Roach to life without the possibility of parole. On count 2 (attempted robbery), the court sentenced Roach to a consecutive term of three years. On count 3 (Dustin's murder), the court sentenced Roach to life without the possibility of parole. For all counts, the court imposed consecutive terms of 25 years to life for the firearm enhancements attached to each count (§ 12022.53, subd. (d)).

Roach appeals, contending the trial court erred by: (1) admitting irrelevant gang evidence; (2) instructing on lying in wait as to Dustin's murder; (3) not instructing the jury that Kenneth Hayes was an accomplice as a matter of law; (4) curtailing defense argument by sustaining the prosecutor's objections; and (5) not staying his sentence for Peter's attempted robbery under section 654. We reject these claims.

¹ Undesignated statutory references are to the Penal Code.

Roach also asserts that the matter should be remanded to allow the trial court the opportunity to strike his firearm enhancements. The People concede, and we agree, that this claim has merit.²

GENERAL FACTUAL BACKGROUND

Dustin's Murder (Count 3)

On April 16, 2006, Marlene S. lived in Barstow, California. Dustin and others were at Marlene's home that evening. As Dustin left, he offered to stop at an outside laundry room to put Marlene's clothes in the dryer. He closed the door and seconds later Marlene heard "a lot of gunshots." Someone ran outside and said that Dustin had been shot.

Dustin died at the scene. He had been shot seven times, three of the shots were to his back. Police found shell casings near Dustin's body, and retrieved a bullet from the wall.

² After reviewing the record, we noted apparent discrepancies, errors, and omissions in the jury instructions as contained in the clerk's transcript, alone and also when compared to the instructions read to the jury contained in the reporter's transcript. We requested that the parties investigate the matter and, if possible, file a joint supplemental letter brief addressing our observations. The parties filed a joint supplemental letter brief agreeing that several of the jury instructions in the clerk's transcript were defective.

Although the parties could not definitively state whether the jury was given the defective written instructions as contained in the clerk's transcript, they definitively stated that (1) a correct set of written instructions was prepared for deliberations, and (2) jurors were able to read a correct set of instructions on PowerPoint while the court read them. The parties also noted that the jury submitted no questions during deliberations.

Based on the parties' investigation, we disregard the jury instructions in the clerk's transcript and base any discussion of jury instructions on those read to the jury by the trial court, which the parties agree are identical to the written instructions prepared for the jury.

Louis Arias testified about the crime. At the time of his testimony, Arias was on parole for being an accessory after the fact to Dustin's murder. Arias pleaded guilty to the charge with the understanding that he was required to testify truthfully. Arias had previously been convicted of first degree burglary and being a felon in possession of a firearm. Arias testified that a "snitch" is a person who tells on somebody, and that snitches are viewed with disfavor and face danger in prison.

Arias testified that on the day of Dustin's murder, Roach told him that Dustin had pointed a gun at Roach's father and took some money. Arias described Roach as "real pissed off." Arias told Roach that he would "give him a ride wherever he wanted to go."

Arias gave a ride to Roach, Leroy Tyus, and someone named Louis. The men told Arias to drive to a place called The Ville. When they got to the location, Louis stayed in the backseat while Roach and Tyus got out of the car and went around the corner between some buildings. After a couple of minutes, Arias heard seven gunshots. Roach and Tyus ran back to the car and Arias drove away. Roach had a gun in his hand. Arias admitted that he previously testified that he did not see a weapon.

Tyus also testified at trial. The trial court, however, held Tyus in contempt because of his courtroom behavior and declared him to be an unavailable witness. The People moved to admit Tyus's prior testimony under Evidence Code section 1291. Defense counsel objected, citing the confrontation clause. After defense counsel conceded that Roach's prior counsel had fully cross-examined Tyus at the preliminary hearing, the court allowed Tyus's preliminary hearing testimony to be read into the record.

At the preliminary hearing, Tyus testified that on the day of Dustin's murder he got into a car with Roach, Arias, and Louis W. and drove to apartments known as The Ville. They were going there to collect some money. He and Roach got out of the car and walked toward a house. He saw a man exit the house and go into a laundry room. Roach walked up to the man and shot him five or six times with a nine-millimeter pistol. He and Roach then ran back to the car.

Roach testified in his own defense. At the time of Dustin's murder he claimed to be in San Bernardino with his grandmother. Roach asserted that Tyus falsely testified about Dustin's murder.

Peter's Attempted Robbery and Murder (Counts 1 and 2)

Around 10:30 p.m. on May 20, 2006, the Sheriff's Department responded to a call at a bar in Victorville, California. The bar was next to a liquor store. A green Dodge Neon had run into the wall of the bar. They found Peter slumped forward in the driver's seat with an apparent gunshot wound to his head. The medical examiner estimated that the shot was fired from one to three feet away. An investigation led detectives to Tyus and twin brothers Kenneth and Kevin Hayes.

A detective questioned Kenneth in July 2006 about the shooting. Kenneth stated that Roach and Tyus were at his house when they decided to go to a liquor store near a club. Kenneth joined them about 10 minutes later. He saw Roach and Tyus behind the club and a bicycle with bags on the handlebars. Roach stated, " 'We fixin to get some money. We fixin to jack somebody,' " to which Tyus replied, " 'Hell yeah. We gonna do that.' " Kenneth decided to take the bicycle, removed the bags and rolled it to the front of

the club when he heard a gunshot, and then saw a car hit the wall. He rode the bicycle home. Roach and Tyus arrived about five or 10 minutes later. Kenneth argued with Roach and Tyus about them getting him involved in the crime and told them to leave.

When the detective told Kenneth that they had surveillance video from across the street, Kenneth changed his story. Kenneth stated that as he came around the corner with the bicycle he saw Roach at the driver's side of a green Neon, and Tyus at the passenger side. Roach yelled at the driver to get out of the car. Kenneth saw Roach shoot the driver, but denied helping or acting as a lookout. Kenneth knew that Roach owned a nine-millimeter handgun.

Kenneth testified that he was on parole for robbery, assault with a deadly weapon, possessing a gun, and burglary. He stated that he could not recall his statements to police, "But if you say I said it, that's what the statement says." When asked if he had been truthful to the police, Kenneth replied, "I don't know." Kenneth stated that a snitch is someone who tells on other people and that in prison, snitches are considered "[t]he worst."

Kenneth claimed that he could not remember if he was present when the murder occurred, "But if I said it then, then I guess it's true." Kenneth testified that he was at the liquor store, that he saw Roach and Tyus, "I seen that green car pull out, and I heard arguing, and I heard a gunshot, and I left." Kenneth could not remember a conversation between Roach and Tyus, or if he heard anyone talk about "jacking" someone. When asked if he had lied to police, Kenneth stated, "I would hope that I didn't. But I don't remember if I lied or not. But if I said that I remembered it and it happened like that,

then it wasn't that far after it happened. Not enough to impair my memory." Kenneth later explained that he could not remember what people had said 10 years ago. Kenneth, however, admitted previously telling police that he saw Roach shoot the victim in the head.

The jury heard Tyus's preliminary hearing testimony. Tyus stated that he, Roach and one of the twins went to a liquor store looking for money. Roach declared his intent to rob someone. Roach had a Glock nine-millimeter handgun that he had stolen during an earlier burglary. "Some dude" came out of the liquor store, got into his car, and tried to back up, but one of the twins pulled up on a bicycle and prevented him from doing so. Roach approached the driver and demanded money. The man said he had no money and tried to take the gun. Roach then shot the man. Tyus admitted he "was on the other side of the door wait'n, anticipat'n," to get the man's money. Roach shot the man in the head and the car subsequently crashed into a wall.

A detective also interviewed Kevin. Kevin was at home with Kenneth when Roach, Tyus, and another person arrived. Roach, Tyus, and Kenneth went to the liquor store. An hour later, Kenneth arrived home alone. Kenneth told Kevin that Roach tried to rob someone and shot the person in the head. Tyus and Roach then arrived at the residence. When Kenneth confronted Roach about the shooting, Roach claimed that the victim had grabbed the gun and that he did not intend to shoot the victim.

At trial, Kevin testified that he was in custody in another state for trafficking heroin and being a felon with a firearm. He also had a California conviction for grand theft and spent time in custody as a juvenile. Kevin claimed that he did not know Tyus,

but admitted knowing Roach. He recalled his police interview in July 2006, but did not remember telling police that Tyus and Roach had been at his home on the night of Peter's murder. Kevin claimed that he could not remember anything about that day or the incident. He did not remember if he told the truth during his police interview, stating that he "lied a lot back then"

Kevin knew that the term "snitch" referred to a person who told on somebody else, and that other people in custody disrespected a person that snitched. He explained that respect was very important to a person who was in custody. Snitches can also be in physical danger while in custody.

Roach denied that he discussed robbing a liquor store customer, claiming he had talked about robbing a person who sold marijuana. Roach claimed that the driver of the Dodge Neon almost hit him as he crossed the parking lot and that he slapped the trunk of the car. As the car slowly backed up, Roach approached the driver's side of the car, slapped the hood and stated, "Hey, what the fuck do you think you're doing?" Roach wanted to fight and stated that he tried to open the driver's side door.

Eventually, the driver opened the door and the men exchanged words. Roach told the driver to get out of the car because he wanted to fight, not rob the man. The man closed the door and started to back up until Kenneth got behind the car. Roach opened the car door and ordered the man out of the car. Roach started to take off his hoodie when he realized that he had his gun. He took out the gun intending to hand it to Tyus who was standing next to the passenger side of the car. Roach claimed that while he had the gun pointed at the driver's head, the driver slammed the car door, the door hit his

forearm and caused the gun to go off. Roach claimed that the shot was accidental and denied intending to shoot the driver.

DISCUSSION

I. *NO PREJUDICIAL ERROR IN ADMITTING GANG EVIDENCE*

A. *Additional Background*

Roach's charges initially included gang enhancements under section 186.22, subdivision (b)(1)(A). Before jury selection, the trial court granted defense counsel's unopposed request to strike the gang enhancements under section 995.

During trial, the prosecutor asked Kevin, without objection, whether he was affiliated with a gang in 2006 or had ever been affiliated with a gang. Kevin denied any gang affiliation. Prior to redirect examination, the prosecutor claimed at sidebar that gang evidence was admissible regarding "the fear of the witness, who's in custody, any gang affiliation currently or back then of the defendant." Defense counsel "vehemently" objected to any gang questions. After the prosecutor indicated that Kevin and Roach would be getting on the same bus, the bailiff stated that the men were housed and transported separately. Nonetheless, the trial court overruled defense counsel's objection "for all the grounds" including under Evidence Code section 352, stating that the gang question was relevant to Kevin's veracity regarding his lack of recall.

Kevin later testified that he was "not sure" whether Roach was a gang member and did not remember making any statements to police that Roach was a member of the "DC Tre Deuce Mafia" or the "California Gardens Crips." After the court overruled defense counsel's Evidence Code section 352 objection, Kevin admitted that there was "probably"

gang activity in jail, but stated that he was not a gang member and did not associate with gang members.

During Kenneth's testimony, after Kenneth admitted that gang member snitches face danger in prison, the prosecutor asked, over defense counsel's objection, whether Roach was a gang member. Kenneth was not sure whether Roach was a gang member, and denied that he, Kevin, or Tyus were gang members.

Over defense counsel's running objection, the prosecutor asked the officer who had previously interviewed Kevin a series of questions eliciting testimony that Roach was a gang member. Arias later testified that Arias was no longer an active gang member. During recross-examination, the prosecutor asked Arias a series of questions regarding his prior gang membership. In response to a question whether Roach was a gang member, Arias replied, "They say he is."

During the reading of Tyus's preliminary hearing testimony, the jury heard Tyus's statement that Dustin's shooting was not "a gang thing" but rather just a bunch of friends getting together. Tyus also testified during the preliminary hearing that Roach was a gang member.

Roach testified that gangs existed where he lived, but denied being a gang member or being "jumped" into a gang. Roach admitted that he was familiar with gang terminology and knew that "BK" stood for "Blood Killer." Roach admitted that he has a "BK" tattoo on his arm. After Roach again denied being a gang member, and after the court overruled defense counsel's objection, the prosecutor got Roach to admit that he previously stated he was a member of a "dancing clique" called DC 32 Mafia. The

prosecutor later asked Roach a series of questions regarding information obtained from Roach's cell phone and found inside Roach's prison cell that Roach admitted pertained to gang culture. The court overruled defense counsel's running objection to this testimony.

The officer that previously interviewed Roach testified that Roach stated he was a member of "DC 32 Trey Deuce Mafia." A detective later testified that after his contact with Roach in 2006, he has never come across a gang called 32 Trey Deuce Mafia. Roach's booking officer in 2007 testified that he filled out a gang interview card for Roach indicating that Roach admitted gang membership with "DC Mafia" and that Roach voluntarily signed the card. Roach's booking officer in 2014 testified that Roach admitted being a member of the "California Gardens Crips." Upon being recalled to the stand, Roach denied telling a deputy that he was a member of the DC Mafia Crip and claimed that the deputy used threats to get him to sign the card. Roach admitted that Tyus was a member of DC Trey Deuce Mafia, but claimed this was a "dance crew."

During closing argument, the prosecutor stated that Tyus had previously admitted a gang enhancement. Defense counsel commenced his closing argument by referencing the testimony about Roach's gang involvement and implored the jury to not look "at this case as a gang case." Defense counsel noted there was no expert testimony that Roach was a gang member or that DC Trey Deuce Mafia or DC Trey Deuce Crip were established gangs.

The prosecutor started his rebuttal argument by stating, "I do not want you to convict someone if they might be, maybe, or possibly are a gang member. That evidence

was introduced to show what the defendant does." Finally, the court did not instruct the jury on gangs or gang evidence.

B. *Analysis*

Roach contends that gang evidence was irrelevant and, therefore, the trial court erred by admitting this evidence. He asserts that the admission of this evidence violated due process and rendered his trial fundamentally unfair. The People claim that the court acted within its discretion in admitting gang evidence because this evidence was relevant to explain changes in testimony and lack of memory by some witnesses. Even assuming error, the People claim the error was harmless because the evidence against Roach was overwhelming. We agree with Roach that the gang evidence was irrelevant, but conclude that the error was harmless.

" 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) " 'While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury.' " (*People v. Freeman* (1994) 8 Cal.4th 450, 491.)

"Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not

cumulative." (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192 (*Avitia*).) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) Gang membership evidence is also "relevant on possible threats to prosecution witnesses, resulting in obvious bias during testimony." (*People v. Harris* (1985) 175 Cal.App.3d 944, 957.)

Nonetheless, even when relevant, "the trial court must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224.) "A trial court's admission of evidence, including gang testimony, is reviewed for abuse of discretion. [Citations.] The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*Avitia, supra*, 127 Cal.App.4th at p. 193.)

The People contend that Roach forfeited this claim because defense counsel did not object to the admission of gang evidence during Kenneth's and Arias's testimony and when Tyus's preliminary hearing testimony was read. We disagree.

To preserve an evidentiary issue for appeal, the objecting party must make a timely objection stating the specific ground on which it is made. (Evid. Code, § 353, subd. (a); *People v. Williams* (2008) 43 Cal.4th 584, 620.) Kevin was the first witness asked about gangs. Without objection, Kevin denied any gang affiliation. Later at

sidebar, defense counsel "vehemently" objected to "any" gang questions. The trial court overruled that objection, finding gang evidence relevant to the witness's truthfulness. This initial objection sufficiently preserved the issue for appeal. In any event, defense counsel objected to a gang question posed to Kenneth, the next witness to testify. When Kenneth completed his testimony, a police officer testified. After the prosecutor asked the officer gang related questions, the court granted defense counsel a "running objection." On this record, we decline to deem the issue forfeited.

The People next assert that evidence of Roach's gang membership and the gang membership of others connected to this case was relevant to explain changes in witness testimony and claimed lack of memory. " 'Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.)

Here, the prosecutor argued to the trial court that gang affiliation evidence pertained to witness fear. The People repeat this assertion on appeal. The People make this argument, however, without citation to the record showing any witness fear. Our review of the record shows that none of the witnesses expressed any general fear, fear of Roach, or fear of gang related retaliation. The only evidence regarding witness fear came from Tyus at the preliminary hearing. When asked whether he feared Roach, Tyus stated, "Not really. I'm not afraid of him." This record shows that gang evidence was not relevant to witness fear.

The People note that Arias, Kenneth, and Kevin testified regarding snitching, including that snitches are viewed with disfavor and face danger in prison. Kenneth also stated that gang member snitches face danger in prison. We agree with the general proposition that a gang member testifying against another gang member could be labeled a snitch and face retaliation for cooperating with law enforcement. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1169 (*Samaniego*) [gang evidence can be relevant to explain a witness's reluctance to testify or inconsistent statements].) Other than Kenneth's brief statement, these witnesses did not testify regarding snitches *in relation* to gang culture. Significantly, the prosecution did not present a gang expert explaining gang culture or the consequences of snitching in relation to gang culture. Nor did the trial court instruct the jury that gang membership or activity can be considered when evaluating the credibility or believability of a witness. (See CALCRIM No. 1403.)

While several witnesses testified differently than at the preliminary hearing or in prior statements given to police, the jurors received no evidence from which they could conclude that gang culture explained the disparities in the witnesses' testimony. In other words, the prosecution could have elicited witness testimony that snitches are disfavored and face physical danger without mentioning gangs or gang membership. (See *Avitia, supra*, 127 Cal.App.4th at p. 193 [error to elicit testimony regarding presence of gang graffiti in appellant's bedroom because evidence did not link appellant to the ownership of the guns as the prosecution had claimed it would].)

The People next argue that Roach's denial of any gang affiliation or membership opened the door for the prosecutor to impeach him with evidence of his gang ties. We again disagree.

To determine a witness's credibility, the jury may consider "[t]he existence or nonexistence of any fact testified to by him." (Evid. Code, § 780, subd. (i).) For example, "a witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony." (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946.) Thus, impeachment evidence may be admitted when it calls into question a witness's credibility, subject to exclusion under Evidence Code section 352. (*People v. Lucas* (2014) 60 Cal.4th 153, 240, disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19 (*Romero*).)

Over defense objection, the prosecutor elicited gang testimony from Kevin, Kenneth, Arias, and a police officer. This testimony did not qualify as impeachment testimony, however, because it occurred before Roach testified. Roach later testified and denied gang membership. After Roach again denied being a gang member, and after the court overruled defense counsel's objection, Roach admitted previously stating that he was a member of a "dancing clique" called DC 32 Mafia. Thereafter, the People presented evidence from law enforcement that in 2006 Roach claimed membership in the "DC 32 Trey Deuce Mafia" gang. Additionally, in 2014 Roach admitted membership in the California Gardens Crip, which was affiliated with the Crips gang. While this

testimony qualified as impeachment testimony, it came after the trial court erroneously allowed admission of gang evidence earlier in the trial.

Although the trial court erred by admitting the evidence of gang membership, we conclude that its admission was harmless under any standard. Where there is " 'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result,' " the error is prejudicial. (*People v. Mower* (2002) 28 Cal.4th 457, 484.)

Here, the gang evidence was limited in scope to evidence of gang membership for Roach and several other witnesses. The parties presented no testimony regarding gang activities, gang crimes, or gang culture. Nor was there any suggestion that the instant crimes were gang related. The gang membership evidence constituted a small percentage of the evidence introduced at trial and did not undercut Roach's defenses that he shot Peter by accident and did not shoot Dustin. Moreover, defense counsel told the jury to not look "at this case as a gang case." The prosecutor echoed this in his rebuttal argument, stating, "I do not want you to convict someone if they might be, maybe, or possibly are a gang member." Looking at the totality of the evidence, we conclude that the jury would have reached the same result even absent any improperly admitted gang membership evidence. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required under the federal Constitution unless the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error requires reversal only if it is reasonably probable that the error had an effect on the verdict].)

II. *SUBSTANTIAL EVIDENCE SUPPORTS THE LYING-IN-WAIT INSTRUCTION*

A. *Additional Background*

During a discussion about jury instructions, the trial court asked the prosecutor about the lying-in-wait theory added to the charge regarding Dustin's murder. The prosecutor argued that Roach shot Dustin "almost ambush-style" as Roach and Tyus ran to the laundry room. The court agreed with this, but questioned whether any concealment existed. After further discussion, the court indicated that it would "read some cases."

The court eventually gave the instruction over defense counsel's objection. The lying-in-wait portion of the first degree murder instruction, CALCRIM No. 521, provided:

"The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter.

"The defendant murdered by lying in wait if: [¶] 1. He concealed his purpose from the person killed; [¶] AND [¶] 2. He waited and watched for an opportunity to act; [¶] AND [¶] 3. Then from a position of advantage he intended to and did make a surprise attack on the person killed.

"The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation. [¶] The deliberation means carefully weighing the considerations for and against the choice, and knowing the consequences decided to act. [¶] And an act is done with premeditation if the decision to commit the act was made before the act is done. [¶] A person can conceal his or her purpose even if the person killed is aware of the person's physical presence. [¶] The concealment can be accomplished by ambush or some other secret plan."

The trial court instructed the jurors on the alternative murder theory of deliberate and premeditated murder. It also instructed on second degree murder and voluntary manslaughter.

B. *Analysis*

Roach contends the trial court erred by instructing the jury with lying in wait as a theory of first degree murder as to Dustin because there is no evidence of concealment or that he engaged in a substantial period of watching and waiting for an opportune time to act. He asserts this instruction prejudiced him because it enabled the jury to bypass the evidence that he had committed a provocation manslaughter shortly after learning that Dustin had robbed Roach's father at gunpoint. Assuming we conclude that the trial court erred by instructing the jury with lying in wait as a theory of first degree murder, he submits that his murder conviction as to Dustin must be reversed because it cannot be sustained on the alternate theory of premeditation and deliberation.

"A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court's decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of a lying-in-wait instruction. Stated differently, we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed murder based on a lying-in-wait theory." (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.) " ' "Substantial

evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive." ' ' (Id. at p. 1215.)

Murder which is perpetrated by lying in wait is first degree murder. (§ 189.) "Lying-in-wait murder consists of three elements: ' ' '(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage' ' ' ' (People v. Russell (2010) 50 Cal.4th 1228, 1244.) The precise time period is not critical, even a few minutes can suffice. (Ibid.) "[P]hysical concealment from, or an actual ambush of, the victim is not a necessary element of the offense of lying-in-wait murder." (People v. Morales (1989) 48 Cal.3d 527, 554-555, disapproved of on other grounds by People v. Williams (2010) 49 Cal.4th 405, 459.) "[T]he concealment element 'may manifest itself by either an ambush or by the creation of a situation where the victim is taken unawares even though he sees his murderer.' " (Morales, at p. 555.)

Here, Marlene testified that she heard gunshots "five seconds" after Dustin closed the door to her home. Someone ran outside and then told her that Dustin had been shot. She discovered Dustin halfway in the laundry room and saw that the laundry room light was on. This evidence suggests that Dustin's attackers waited for him near the laundry room and that they ambushed Dustin moments after he arrived at the laundry room.

Arias's testimony supports this conclusion. Arias stated that Roach and Tyus exited the car and that a couple of minutes elapsed before he heard seven gunshots. Tyus similarly testified that he and Roach got out of the car and headed toward a house. They

saw a man come out of the house and go into the laundry room. Roach walked up to the man and shot him several times.

Finally, a witness testified that she was at a park near The Ville when she saw a car park and two young men get out of the car and run toward Marlene's house. The men went to Marlene's laundry room. She then heard gunshots. During cross-examination the witness stated that the car parked and sat there for about five minutes. She explained that two men ran behind her, but that she did not know whether the men were the same people that were in the car. After the men went into the laundry room, she heard gunshots.

From this evidence a reasonable trier of fact could have found that Roach concealed his purpose and that he watched and waited for a substantial period of time before acting. Because sufficient evidence supported instructing the jury on the theory of first degree murder by lying in wait, we reject Roach's argument that the trial court erred by instructing the jurors with this theory. Accordingly, we need not address Roach's alternative argument that his murder conviction as to Dustin must be reversed because it cannot be sustained on the alternate theory of premeditation and deliberation.

III. NO ERROR IN ACCOMPLICE TESTIMONY INSTRUCTION

A. Additional Background

At the close of the prosecution's case-in-chief, defense counsel moved for a judgment of acquittal under section 1118.1, arguing that Tyus and Kenneth were accomplices in Peter's murder and that insufficient corroboration existed for the matter to proceed to the jury. Defense counsel asked the court to find that Kenneth was an accomplice as a matter of law based on Tyus's testimony that Kenneth pulled his bike

behind Peter's car and prevented Peter from backing up his car. The prosecutor admitted that Tyus was an accomplice, but argued that the jury needed to decide whether Kenneth qualified as an accomplice.

The court denied the section 1118.1 motion, stating sufficient corroboration existed for the case to proceed to the jury without determining whether Kenneth qualified as an accomplice as a matter of law. The court instructed the jurors that Tyus was an accomplice as a matter of law, but that they needed to determine whether Kenneth was an accomplice before considering whether his testimony required corroboration.

B. *Analysis*

"[E]ven though accomplice testimony would qualify as 'substantial evidence' to sustain a conviction . . . the Legislature has for policy reasons created an 'exception[]' to the substantial evidence test and requires accomplice testimony to be corroborated." (*People v. Najera* (2008) 43 Cal.4th 1132, 1137, citation omitted.) "The need for the statutory requirement has been expressed as a check against the possibility that one confessedly guilty of a crime may implicate another for the sole purpose of gaining leniency." (*People v. Robinson* (1964) 61 Cal.2d 373, 404, fn. 25.)

"Mere accessories are not accomplices under section 1111." (*People v. Howard* (1992) 1 Cal.4th 1132, 1173.) "To be an accomplice, a witness must have ' " 'guilty knowledge and intent with regard to the commission of the crime. . . . ' " ' [Citation.] The definition of an accomplice 'encompasses all principals to the crime including aiders and abettors and coconspirators.' [Citation.] To be an accomplice, one must act ' "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either

of committing, or of encouraging, or facilitating commission of, the offense." '

[Citation.] [¶] The defendant has the burden of proving the witness's status as an accomplice by a preponderance of the evidence." (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 23.) "[W]hether a witness is an accomplice is a question of fact for the jury unless no reasonable dispute exists as to the facts or the inferences to be drawn from them." (*People v. Manibusan* (2013) 58 Cal.4th 40, 93 (*Manibusan*)). "[A] court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.'" (*People v. Williams* (1997) 16 Cal.4th 635, 679 (*Williams*)).

The trial court instructed the jury that before it could consider Kenneth's testimony regarding Peter's attempted robbery and murder, it needed to determine whether Kenneth was an accomplice. Roach claims the court erred because Kenneth was an accomplice as a matter of law. We disagree because the evidence regarding Kenneth's participation in the crimes was not " 'clear and undisputed.' " (*Williams, supra*, 16 Cal.4th at p. 679.)

Tyus testified that one of the twins accompanied him and Roach to the liquor store. They all wanted money, but did not discuss how to get some. "[O]ut of the blue" Roach decided to rob someone. Kenneth provided differing accounts of the crimes. He initially told police that he heard Roach and Tyus discuss "jack[ing] somebody." At trial, Kenneth could not remember a conversation between Roach and Tyus, or if he heard anyone talk about "jacking" someone. Both versions of Kenneth's testimony, however, suggest that he did not participate in the robbery plan.

Kenneth's actions during the attempted robbery are also subject to differing interpretations. Tyus testified that when Peter tried to back up, one of the twins pulled up on a bicycle and prevented him from doing so. When interviewed by police, Kenneth repeatedly denied helping or acting as a lookout. Finally, Kevin (Kenneth's) brother told a detective that when Roach and Tyus returned after the shooting, Kenneth was so upset with them that he wanted to fight. This supports Kenneth's claim that he did not participate in the plan to rob Peter.

On this record, the court properly refused to instruct the jury that Kenneth was an accomplice as a matter of law and correctly allowed the jury to decide whether Kenneth had the intent necessary to establish accomplice status. (*Manibusan, supra*, 58 Cal.4th at p. 94.)

Even assuming Kenneth qualified as an accomplice, the assumed error was harmless because the record contained sufficient corroborating evidence regarding Roach's participation in Peter's attempted robbery and murder. Corroborative evidence need not directly connect the accused with the offense but need only tend to do so. The requisite evidence " 'need not independently establish the identity of the [perpetrator]' [citation], nor corroborate every fact to which the accomplice testifies [citation]."

(*Romero, supra*, 62 Cal.4th at p. 32.) The requisite corroboration "must, without aid from the accomplice's testimony, connect the defendant to the charged offense, but may be circumstantial, slight and entitled to little consideration when standing alone.

[Citations.] Corroborating evidence need not be sufficient to establish the defendant's guilt or corroborate the accomplice to every fact to which the accomplice testified.

[Citations.] It must raise more than a suspicion or conjecture of guilt, and is sufficient if it connects the defendant with the crime in such a way as to reasonably satisfy the trier of fact as to the truthfulness of the accomplice." (*Samaniego, supra*, 172 Cal.App.4th at pp. 1177-1178.)

Kenneth told police that Roach planned to rob Peter and ultimately shot Peter in the head with a gun. Kevin's statements to detectives amply corroborated this testimony. Kevin told a detective that Roach shot the person he tried to rob in the head. At the time of this interview, the police had not released any information that Peter had been shot in the head. Additionally, after Dustin's and Peter's murders, Roach gave a gun to his friend, Reginald. A criminalist later determined that this gun was used to murder both Dustin and Peter. This independent evidence sufficiently connected Roach to Peter's attempted robbery and murder " 'in such a way as to satisfy the jury that [Kenneth was] telling the truth.' " (*People v. Lewis* (2001) 26 Cal.4th 334, 370.) Accordingly, any assumed error in the omission of an instruction that Kenneth was an accomplice as a matter of law was harmless.³

³ Without citation to authority, Roach claims that Kenneth qualifies as an accomplice as a matter of law because the court instructed the jury on conspiracy, stating that Kenneth committed an overt act in furtherance of a conspiracy by preventing Peter's " 'vehicle from travelling.' " However, CALCRIM No. 415, instructed the jurors that "Someone who merely accompanies or associates with members of a conspiracy, but who does not intend to commit the crime, is not a member of the conspiracy. [¶] Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough by itself to prove that the person was a member of the conspiracy." Thus, the mere allegation that Kenneth committed an overt act in support of an alleged conspiracy is insufficient to make Kenneth an accomplice as a matter of law.

IV. *NO VIOLATION OF ROACH'S RIGHT TO PRESENT A COMPLETE DEFENSE*

A. *Additional Background*

Tyus appeared as a witness, however, he refused to cooperate and was removed from the courtroom. Before the trial court declared Tyus unavailable, it indicated that defense counsel would be "stuck with [prior] counsel's cross-examination from the preliminary hearing." Defense counsel expressed his belief that this cross-examination "was quite thorough."

The following day, the trial court held Tyus in contempt based on his courtroom behavior. The court then asked defense counsel to comment on Tyus's unavailability to testify. Defense counsel stated that Tyus's behavior made him an unavailable witness under Evidence Code section 240, subdivision (a)(6) based on Tyus's refusal to testify.

The court declared Tyus to be an unavailable witness. The People then moved to admit Tyus's prior testimony under Evidence Code section 1291. Defense counsel objected, citing the confrontation clause. After defense counsel conceded that Roach's prior counsel had fully cross-examined Tyus at the preliminary hearing, the court allowed Tyus's preliminary hearing testimony to be read to the jury.

During closing argument, defense counsel referred to CALCRIM No. 226 as it pertained to Tyus. Counsel argued as follows:

"Why am I focusing on this 226? Because as it says, 'You alone must judge the credibility or believability of witnesses.' This case is a credibility case. The credibility of witnesses is what this case is all about in determining responsibility, especially responsibility as to my client, Kevin Roach. You alone judge the credibility of witnesses in deciding whether testimony is true and accurate.

"Use your common sense and experience. You must judge the testimony of each witness by the same standards setting aside any bias or prejudice you may have. You may believe all, part, or none of the witness's testimony. Consider the testimony of each witness, and decide how much of it you believe.

"Now, why am I going through this? Because this next paragraph: 'In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony.' Among the factors that you may consider are was Leroy Tyus—did he testify? No, he did not. And because why? Because he was deemed unavailable. The law allows that. I can't change it. I can't change the law myself. I may not like it, because I would have wanted to be able to cross-examine Leroy Tyus. I certainly would have."

The prosecutor objected to the argument as improper vouching. The trial court commented, "It does kind of sound like that." The court noted that it admitted Tyus's testimony from the preliminary hearing because Tyus was subject to cross-examination by another attorney. The court instructed counsel not to speculate on what might have happened if counsel had cross-examined Tyus. Defense counsel continued his argument, stating, "I would like to have cross-examined Mr. [Leroy Tyus]." The trial court stated it would not allow that same line of argument, and explained:

"[B]ecause [Tyus's] testimony came in, because he was subject to previous cross-examination, which is part of the record. And for you to have them speculate of what would have happened had you cross-examined him would be nothing more than just speculation."

Defense counsel asked the trial court if he could direct the jury to consider the factors listed in CALCRIM No. 226 for evaluating a witness's testimony. The court responded affirmatively. Defense counsel continued with his argument as follows:

"All right. I just want then to direct your attention to what you as jurors would have been able to do if Mr. Leroy Tyus had testified. . . . You as

jurors could have evaluated how well Mr. Tyus could see, hear, or otherwise perceive things about which he testified.

"And, again, because he testified at a preliminary hearing, that was conducted on June 1 of 2011, and he was cross-examined by Mr. Roach's attorney at the time, and so—but in terms of trial testimony, you could not look at what he appeared to be, how well he could see, hear, or otherwise perceive things that he was testifying about.

"All right. Secondly, you could not evaluate how well Mr. Tyus was able to remember and describe what happened."

The prosecutor objected, asserting that defense counsel was arguing facts not in evidence. The trial court sustained the prosecutor's objection. When defense counsel asked if he could continue with his argument, the court responded:

". . . Depends on where you want to move to. If you want to move to the factors that are relevant, and not factors that have to do with speculation on what they may have observed had Mr. Tyus been examined by you, we are not going to hear anymore of that. Now, there could be other factors that are present in 226 that you might wish to address the jury's attention to. To the extent you want to do that, you may proceed."

Defense counsel indicated he would try to comply with the trial court's ruling. Later in his argument defense counsel referenced the factors listed in CALCRIM No. 226, noting that "you were not able to apply [these factors] directly as jurors to [Kenneth and Tyus]." The trial court sustained the prosecutor's objection, and instructed the jury, "You are not to speculate on what would have happened had [Tyus] testified before them. You don't have any evidence of that."

B. *Analysis*

Roach asserts that the trial court impeded his due process right to present a complete defense when it did not allow defense counsel to comment on counsel's

inability to cross-examine Tyus, and more generally on the jury's inability to evaluate Tyus's testimony employing the same factors it would have with a live witness. He argues that defense counsel should have been allowed to remind the jurors that they were getting an incomplete version of the truth by the recorded testimony, and that the error is not harmless beyond a reasonable doubt. As we shall explain, Roach's argument lacks merit.

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses." (*People v. Herrera* (2010) 49 Cal.4th 613, 620.) An exception to the confrontation requirement exists where " 'a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] was subject to cross-examination ' " (*Id.* at p. 621.) This exception is codified in Evidence Code section 1291. (*Herrera*, at p. 621.) The admission of former testimony is permitted if: (1) the witness is unavailable; and (2) the party against whom the former testimony is offered was a party to the prior proceeding and had the right and opportunity to cross-examine the witness with an interest and motive similar to that which that party has at the present hearing. (Evid. Code, § 1291, subd. (a)(2).)

The term " 'unavailable as a witness' " includes a declarant who is "[p]ersistent in refusing to testify concerning the subject matter of the declarant's statement despite having been found in contempt for refusal to testify." (Evid. Code, § 240 subd. (a)(6).) "Courts have admitted 'former testimony of a witness who is physically available but who refuses to testify (without making a claim of privilege) if the court makes a finding of

unavailability only after taking reasonable steps to induce the witness to testify unless it is obvious that such steps would be unavailing.' " (*People v. Smith* (2003) 30 Cal.4th 581, 624.) " 'When the requirements of Evidence Code section 1291 are met, "admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 67.)

Here, although defense counsel objected to the admission of Tyus's preliminary hearing testimony under the confrontation clause, the trial court overruled that objection and Roach does not argue on appeal that the court erred in doing so. Roach also does not contest that Tyus qualified as an unavailable witness under Evidence Code section 240. Nor does Roach argue that his prior counsel's cross-examination of Tyus at the preliminary hearing was inadequate. Rather, defense counsel conceded during trial that Roach's prior counsel had fully cross-examined Tyus at the preliminary hearing. Further, Roach's former counsel had the same motivation in cross-examining Tyus during the preliminary hearing as Roach's counsel at trial; namely, to discredit Tyus's claim that Roach committed the charged crimes.

Instead, Roach asserts that defense counsel sought only to remind the jury of the factors under CALCRIM No. 226 that it could not evaluate because there was no witness physically present before them.⁴ He notes that the trial court instructed with a modified version of CALCRIM No. 317, as follows: "The testimony that Leroy Tyus has given under oath was read to you because he is not available. You must evaluate this testimony

⁴ CALCRIM No. 226 instructs the jury regarding its role in determining the credibility of witnesses, and provides several factors the jury may consider when performing this function.

by the same standards that you apply to a witness who testified here in court." Roach asserts that this instruction directs the jury to do the impossible because a witness's behavior while testifying cannot be evaluated during a read back of former testimony. Additionally, other factors listed in CALCRIM No. 226 can only be fully evaluated during live testimony.

"We 'credit jurors with intelligence and common sense,' " and do not assume these virtues are abandoned when presented with jury instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) Additionally, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." (*Boyd v. California* (1990) 494 U.S. 370, 380-381.)

Here, the jurors obviously knew that Tyus was absent from trial and, therefore, that some of the factors in CALCRIM No. 226 did not apply. Defense counsel argued this point before the prosecutor objected. The trial court properly prohibited defense counsel from arguing that he would have liked to have cross-examined Tyus himself because this argument necessarily required jurors to speculate about what Tyus would have said or done while testifying live. Moreover, the trial court's ruling did not prevent defense counsel from fully arguing his theory that Peter's shooting was accidental and Roach was not present when Dustin was shot. Accordingly, we reject Roach's argument that the trial court impeded his due process right to present a complete defense.

V. SECTION 654 DOES NOT REQUIRE STAY OF THE ATTEMPTED ROBBERY SENTENCE

The trial court sentenced Roach to life without the possibility of parole for murdering Peter during an attempted robbery. Roach also received a consecutive upper term of three years for attempting to rob Peter.

Roach argues that his sentence for the attempted robbery violates section 654 because the underlying conduct for the attempted robbery and murder are indistinguishable—shooting Peter during the commission of an attempted robbery. The People disagree, asserting the sentence does not violate section 654 because Roach harbored multiple objectives for the murder and attempted robbery. Specifically, they claim the evidence shows that Roach initially intended to obtain money from Peter, but when Peter refused to give him any money and started arguing, Roach formed the separate intent to kill Peter. We reject Roach's argument that section 654 required a stay of his attempted robbery sentence.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Section 654 is intended "to insure that a defendant's punishment will be commensurate with his [or her] culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 552 (*Perez*).) Multiple criminal objectives may "be a predicate for multiple punishment only in circumstances that involve, or arguably involve, multiple

acts. The rule does not apply where . . . the multiple convictions at issue were indisputably based upon a single act." (*People v. Mesa* (2012) 54 Cal.4th 191, 199.)

Whether a defendant's multiple crimes involved multiple objectives generally is a question of fact for the sentencing court. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) Where the trial court makes no express findings on the issue, its imposition of separate sentence terms may constitute an implied finding that the offenses were divisible. (*People v. Nelson* (1989) 211 Cal.App.3d 634, 638.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) We review the evidence in the light most favorable to the People and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. McGuire* (1993) 14 Cal.App.4th 687, 698.)⁵

A separate act of violence after a robbery is complete, "whether gratuitous or to facilitate escape or to avoid prosecution," may be found "not incidental to robbery for purposes of section 654." (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 193.) As the *Nguyen* court noted, "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime. [¶] We should not lose sight of the purpose underlying section 654, which is 'to insure

⁵ Although Roach did not raise section 654 in the trial court, the issue may be raised for the first time on appeal. (*Perez, supra*, 23 Cal.3d at p. 549, fn. 3.)

that a defendant's punishment will be commensurate with his culpability.' " (*Id.* at p. 191.)

Viewed in the light most favorable to the judgment, the record supports the trial court's implicit finding that Roach's intent and objective changed during his encounter with Peter. Tyus testified, and Kenneth stated during a police interview, that Roach initially intended to rob a person to obtain money. Kenneth told police that during the incident Roach yelled at the driver to get out of the car. At trial, Kenneth stated that he heard arguing before the gunshot. Tyus testified that Roach demanded money from the driver and that Roach shot the driver after the driver said he had no money and tried to take the gun.

Here, Roach completed the attempted robbery when Peter refused to hand over his money or stated that he had no money. (*People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1299 [attempted robbery was complete where victim refused to hand over his money, although victim did not attempt physically to resist his armed attacker].) Although Roach used the gun to effectuate the attempted robbery, after completing the attempted robbery, he then used the gun to kill, possibly seeking to eliminate the primary witness to his attempted robbery and avoid prosecution. The medical examiner estimated that the bullet that killed Peter was fired from one to three feet away. This fact undercuts Roach's trial testimony about the shooting, and Roach's statement to Kevin after the incident that the driver had grabbed the gun and that he did not intend to shoot the driver.

On this record, substantial evidence supports the trial court's implicit finding that Roach entertained multiple objectives and that the sentence for attempted robbery should not be stayed under section 654.

VI. *ROACH IS ENTITLED TO A REMAND TO ALLOW THE TRIAL COURT TO CONSIDER STRIKING THE FIREARM ENHANCEMENTS*

On counts 1, 2, and 3, Roach's sentence included consecutive 25-year-to-life terms based on the jury's true findings on the firearm enhancements under section 12022.53, subdivision (d) attached to these counts. Roach contends, and the People concede, that this matter should be remanded to allow the trial court to exercise its discretion whether to strike the firearm enhancements. We agree.

Under an amendment to section 12022.53, effective January 1, 2018, trial courts now have the power to strike or dismiss an enhancement otherwise required to be imposed by section 12022.53. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The parties agree, and we concur, that the amendment to section 12022.53 applies retroactively. (*Woods*, at p. 1090.) Accordingly, the matter must be remanded to provide the court with the opportunity to exercise its discretion to strike or dismiss the firearm enhancements. We express no opinion about how the court's discretion should be exercised.

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing the trial court to exercise its sentencing discretion under sections 1385, 12022.5, subdivision (c), and section 12022.53, subdivision (h). If appropriate following exercise of that

discretion, the trial court is to resentence appellant accordingly, amend the abstract of judgment and its minute order of the sentencing hearing and provide a corrected abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

GUERRERO, J.